

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 17 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BENITO HERNANDEZ-GONZALEZ,

Defendant - Appellant.

No. 04-50574

D.C. No. CR-04-00723-R-01

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted October 17, 2005
Pasadena, California

Before: HALL, O'SCANNLAIN, and PAEZ, Circuit Judges.

Benito Hernandez-Gonzalez appeals the district court's five-year sentence following his plea of guilty to a violation of 8 U.S.C. § 1326(a),(b)(2). We have jurisdiction under 28 U.S.C. § 1251, and we affirm.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

In sentencing Hernandez-Gonzalez, the district court determined that the United States Sentencing Guidelines were unconstitutional. As a result of this ruling, the district court imposed a five-year sentence without considering the sentencing factors enumerated in 18 U.S.C. § 3553(a) or providing a statement of reasons for Hernandez-Gonzalez's particular sentence. These omissions were error. *See Booker v. United States*, 543 U.S. 220, 125 S. Ct. 738, 767 (2005).

We need not resolve whether Hernandez-Gonzalez's Sixth Amendment challenge to the Sentencing Guidelines was sufficient to encompass these particular errors because, even under a harmless error standard of review, we are persuaded that Hernandez-Gonzalez suffered no prejudice.

Because the district court did not apply the Sentencing Guidelines when it imposed the five-year sentence, Hernandez-Gonzalez lacks standing to challenge the constitutionality of U.S.S.G. § 3E1.1(b). *See United States v. Zavala-Serra*, 853 F. 2d 1512, 1517 (9th Cir. 1988).

Hernandez-Gonzalez also challenges the district court's failure to resolve his written objection to an alleged factual error in the pre-sentence report (PSR) regarding his use of an alias and incorrect date of birth. *See Fed. R. Crim. P.* 32(i)(3)(B). However, when asked whether he had any corrections to the PSR, Hernandez-Gonzalez answered "no." Moreover, we are persuaded by the record

that, even if the court erred under Rule 32(i)(3)(B), the disputed information did not affect the court's sentence. Thus, the district court did not plainly err in failing to resolve Hernandez-Gonzalez's Rule 32(i)(3)(B) objection.

AFFIRMED.